IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-926

GERALDINE G. CANNON,

Petitioner,

v.

THE UNIVERSITY OF CHICAGO, et al.,

Respondents.

GERALDINE G. CANNON,

Petitioner,

v.

NORTHWESTERN UNIVERSITY, et al.,

Respondents.

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Brief of the National Urban League, the American Jewish Committee, the Puerto Rican Legal Defense and Education Fund, the National Association for the Advancement of Colored People, The Mexican American Legal Defense and Education Fund, and the Anti-Defamation League of B'nai B'rith, Amici Curiae

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THE CASILLAS PRESS, INC.

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STATEMENT OF INTEREST

This brief is submitted by written consent of all parties on behalf of the National Urban League, the American Jewish Committee, the Puerto Rican Legal Defense and Education Fund, the National Association for the Advancement of

Colored People, the Mexican American Legal Defense and Education Fund, and the Anti-Defamation League of B'nai B'rith. Each of these groups is a national civil rights organization dedicated to the realization of equal opportunity and equal protection for all citizens of the United States. In particular, each group is concerned that equal educational opportunity be afforded to all citizens, including women and racial and ethnic minorities.

INTRODUCTION

This case presents the question whether Congress succeeded in its evident intent to establish for every person in the United States the right to be free from sex discrimination in specific federally assisted education programs.

The court below would frustrate that intent by holding that a woman cannot vindicate her rights by her own lawsuit, that she can do no more than entreat a federal bureau to commence its process. In that process she is at best a bystander, at arm's length. Moreover, that process is designed not to correct the wrong she has suffered but to vindicate the federal agency's interest in assuring that its funds are not misused. The court says that the duty of federally aided institutions not to discriminate runs not to her, but to the federal government. She is left to abide by the "sophisticated scheme" of the Department of Health, Education and Welfare — a scheme compounded of massive bureaucracy, the vagaries of politics, the remoteness of Washington.

Such a position is contrary to American tradition. The principle that the courts will provide remedies in order to protect federal statutory rights dates to the earliest decisions of this Court. And as recently as 1970, this Court held that an individual could assert his rights in court under a federal statute governing a state welfare program,

that he was not to be left dependent on what a federal administrative agency might decide to do. *Rosado* v. *Wyman*, 397 U.S. 397 (1970). The courts consistently have recognized private rights of action to remedy discrimination prohibited by Title VI of the 1964 Civil Rights Act[1] — the statute on which Congress deliberately patterned Title IX of the 1972 Education Amendments.[2]

The position of the court below would also create a two-tiered scheme for enforcement of the right to be free from sex discrimination. Those victimized by public institutions would have access to the courts, but those suffering discrimination by private institutions would be relegated to an unwieldy and ineffective administrative process. The absolute prohibitions Congress enacted in the Civil Rights Act of 1964 and in Title IX of the 1972 Education Amendments cannot support this differential treatment: under their language the right to be free from discrimination is just as complete against the private institution as against that maintained by the state.

A. The Statute

Two provisions of Title IX bear on this case. The first is section 901, which provides in sweeping and unqualified terms:

> No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance . . . .

20 U.S.C. § 1681(a) (Supp.V, 1975). Then there is section 902, which directs federal agencies offering financial assistance to education to issue regulations and general orders implementing the prohibition of section 901. Section

[1] 42 U.S.C. § 2000d *et seq.* (1970).

[2] 20 U.S.C. § 1681 *et seq.* (Supp. V, 1975).

902 provides essentially that federal agencies may effect compliance with their administrative requirements through a process that commences with discussion aimed at voluntary compliance and leads, upon a formal determination of a failure to comply with an administrative requirement, to the ultimate sanction of a termination or refusal of federal funding. Section 902 also requires that the appropriate committees of Congress be notified at least 30 days before any proposed refusal or cut-off of funding is to become effective. 20 U.S.C. § 1682 (Supp. V, 1975).

Thus Congress enacted two distinct provisions. Section 901 contains the absolute mandate that "No person in the United States" shall suffer sex discrimination in any education program covered by the statute: it establishes the personal right of the individual to be free of sex discrimination. Section 902, on the other hand, is concerned with protecting the rights of recipient institutions in the administrative process used to enforce nondiscrimination requirements.

B. The Administrative Agency

The Department of Health, Education and Welfare administers the vast preponderance of the federal programs assisting education to which Title IX is directed. HEW has promulgated substantive regulations repeating and, in some cases, elaborating upon the statutory prohibition of section 901.[3] It has also prescribed procedures for the section 902 termination process through adoption by reference of procedural regulations previously issued under Title VI of the Civil Rights Act.[4]

HEW's procedural regulations are not designed to aid individual victims of discrimination. An individual complainant is to be notified in writing if an investigation indicates no need for further HEW action, but she receives no

[3] 45 C.F.R. § 86 (1977).
[4] 45 C.F.R. § 86.71 (1977).

notice if in fact the investigation discloses noncompliance with the statute. If HEW suspects that an applicant or recipient has discriminated, it can take no action without a hearing. Significantly, the right to be heard belongs to the applicant or recipient — not to the complaining victim. Under § 81.23 of HEW's rules, a complainant "is not a party to the proceedings governed by this part, but may petition, after proceedings are initiated, to become amicus curiae."[5] As an amicus, a complainant may file a brief but is not entitled to submit evidence. Moreover, because a complainant lacks party status she cannot file exceptions to a hearing examiner's initial decision under § 80.10(a), nor can she petition the Secretary for review under § 80.10(e) or § 81.106.

In practice, applicants for and recipients of HEW funds have not needed the safeguards contained in these regulations. In six years, HEW's Office of Civil Rights has not once cut off federal funding to discourage noncompliance. Indeed, HEW Secretary Califano recently admitted that "Title IX has not been adequately enforced." He has acknowledged the Department's "appalling legacy of unreviewed complaints, inadequate staffing, and little development of policy."[6]

ARGUMENT

I. TITLE IX CREATES PERSONAL RIGHTS ENFORCEABLE IN PRIVATE ACTIONS.

A. Section 901 Creates Personal Rights.

The sweeping language of section 901 makes plain the congressional purpose behind Title IX: "No person in the

[5] Indeed, a complainant is not even assured amicus status. 45 C.F.R. § 81.22(a) (1977) provides that the "presiding officer may grant [a] petition if he finds that the petitioner has a legitimate interest in the proceedings, that such participation will not unduly delay the outcome, and may contribute materially to the proper disposition thereof."
[6] Statement of Joseph A. Califano, Jr., Secretary of Health, Education and Welfare, HEW Press Release, June 26, 1978.

United States shall, on the basis of sex," suffer discrimination in federally assisted education programs. These words do not connote protracted administrative proceedings or bureaucratic encouragement of compliance — instead they unequivocally prohibit discrimination. Senator Bayh, the principal sponsor of the bill that became Title IX, explained that it was designed to provide women "an equal chance to attend the schools of their choice."[7] To that end Congress enacted this "strong and comprehensive measure . . . to provide women with solid legal protection" from "pernicious discrimination" in education.[8]

The prohibitory language of section 901 closely tracks the wording of section 601 of the Civil Rights Act of 1964.[9] In enacting the 1972 Education Amendments, Congress expressed its view that Title IX "is really the same thing as the Civil Rights Act in terms of race,"[10] that Title IX was enacted to close the "loophole" in the 1964 Act, which failed to reach discrimination by sex.[11] The courts have construed the parallel language of section 601 to be "a prohibition, not an admonition."[12] The legislative history of

[7]118 Cong. Rec. 5808 (1972).

[8]118 Cong. Rec. 5804 (1972).

[9]Section 601 states:

> No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

[10]117 Cong. Rec. H. 39,256 (daily ed. Nov. 1, 1971) (statement by Rep. Green, to which Rep. Waggonner assented). Senator Bayh added that his amendment set forth "prohibition and enforcement provisions which generally parallel the provisions of title VI." 118 Cong. Rec. 5807 (1972).

[11]118 Cong. Rec. 5807 (1972).

[12]Bossier Parish School Board v. Lemon, 370 F.2d 847, 852 (5th Cir.), *cert. denied*, 388 U.S. 911 (1967); *see also* Serna v. Portales Municipal Schools, 499 F.2d 1147 (10th Cir. 1974); *cf.* Lloyd v. Regional Transportation Authority, 548 F.2d 1277, 1280 (7th Cir. 1977).

Title VI demonstrates that Congress had a purpose broader than simply ending federal support of discriminatory institutions. Congress believed that "action to end [ethnic] discrimination is preferable [to termination of funding] since that reaches the objective of extending the funds on a nondiscriminatory basis."[13] There is no reason to believe Congress had a different or less compelling purpose in forbidding sex discrimination in 1972. To the contrary, the use of language previously construed to create enforceable personal rights demonstrates congressional intent to protect individuals seeking an equal opportunity to participate in federally aided programs.[14]

Had Congress enacted only section 901, without any provision for administrative regulations or their enforcement, that section clearly would be enforceable in private actions. A rich legacy of judicial opinion, dating at least to *Marbury* v. *Madison*, 5 U.S. 137 (1803),[15] supports the principle that courts will fashion remedies in order to enforce statutory rights. This principle was the basis of Mr. Justice Pitney's opinion in *Texas and Pac. Ry.* v. *Rigsby*, 241 U.S. 33, 39 (1916):

> "[I]n every case, where a statute enacts, or prohibits a thing for the benefit of a person, he shall have a remedy upon the same statute for the thing enacted for his advantage . . . ."[16]

See also Wyandotte Transportation Co. v. *United States*, 389 U.S. 191, 202 (1967); *Wheeldin* v. *Wheeler*, 373 U.S. 647, 650-52 (1963); *Texas & N.O.R.R.* v. *Brotherhood of*

[13]110 Cong. Rec. 7065 (1964) (statement of Senator Ribicoff).

[14]*See* Bossier Parish School Board v. Lemon, 370 F.2d at 852.

[15]In *Marbury*, Mr. Chief Justice Marshall looked to the heritage of the common law for the "general and indisputable rule, that where there is a legal right, there is also a legal remedy by suit, or action at law, whenever that right is invaded." 5 U.S. at 163, quoting 3 Blackstone, *Commentaries* at 23.

[16]241 U.S. at 39, quoting Holt, C.J., 6 Mod. 26, 27.

Ry. & S.S. Clerks, 281 U.S. 548, 562-67 (1930); *Pollard* v. *Bailey*, 87 U.S. 520, 527 (1874).

This principle is stated even more forcefully in decisions involving the protection of important personal rights. "[W]here federally protected rights have been invaded, it has been the rule from the beginning that courts will be alert to adjust their remedies so as to grant the necessary relief." *Bell* v. *Hood*, 327 U.S. 678, 684 (1946). In *Bivens* v. *Six Unknown Named Agents*, 403 U.S. 388, 392 (1971), the Court relied on this principle in permitting private actions to protect the citizen's "absolute right to be free from unreasonable searches and seizures" proscribed by the Fourth Amendment.

This Court's decision in *Allen* v. *State Board of Education*, 393 U.S. 544 (1969), involved the application of this principle to a provision virtually identical to section 901.[17] Section 5 of the Voting Rights Act of 1965 provides that "no person shall be denied the right to vote for failure to comply with [a new state enactment covered by, but not approved under, § 5]." 393 U.S. at 555. As the Court noted, "[t]he Voting Rights Act does not explicitly grant or deny private parties authorization to seek a declaratory judgment that a State has failed to comply with the provision of the Act." 393 U.S. at 554-55 (footnote omitted). Nevertheless, the Court found that private actions should be allowed, in order that the statutory guarantee not "prove an empty promise." 393 U.S. at 557.[18]

[17]In his opinion on behalf of four members of this Court in Regents of the University of California v. Bakke, 98 S.Ct. 2733, 2809 (1978), Mr. Justice Stevens noted the clear analogy between the Voting Rights Act of 1965, 42 U.S.C. § 1973 *et seq.* (1970), and Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d *et seq.* (1970). In support of his conclusion that the statutes imply private rights of action, he stressed that both "are broadly phrased in terms of personal rights ('no person shall be denied . . .') . . . ." 98 S.Ct. at 2815 n.28.

[18]The Court noted that the Attorney General's "limited staff" might not be able to "uncover quickly new regulations and enactments passed by the varying levels of state government." 393 U.S. at 556. A year prior to *Allen*, the Court observed in Newman v. Piggie Park Enterprises, 390 U.S. 400 (1968):

> When the Civil Rights Act of 1964 was passed, it was evident that enforcement would prove difficult and that the nation would have to rely in part upon private litigation as a means of securing broad compliance with the law.

390 U.S. at 401 (footnote omitted).

At least in the realm of individual rights, the Court's recent formulation of the implication doctrine in *Cort* v. *Ash*, 422 U.S. 66 (1975), is thoroughly consistent with the principle that courts will fashion remedies in order to fulfill the legislative purpose. Two of the four relevant factors identified in *Cort* are easily disposed of in consideration of a remedial civil rights statute such as Title IX. A provision stating that no person shall suffer discrimination by sex is clearly enacted for the benefit of those discriminated against; and the prohibition of sex discrimination is plainly not a subject traditionally relegated to state law or of primary concern to the states. A third relevant factor under *Cort* is evidence of legislative intent either to permit or to deny private rights of action.[19] While Congress described the broad legislative purpose behind Title IX, it was less explicit with respect to section 901 private rights of action. Thus, the *Cort* analysis is reduced to the same inquiry posed in earlier decisions: do private actions serve the purpose underlying the statutory scheme?[20]

[19]*Cort* stated that evidence of "an explicit purpose to *deny* such cause of action would be controlling." 422 U.S. at 82. A clear indication of legislative intent to allow private actions would also control.

[20]Some commentators have called *Cort* a retrenchment from prior implication decisions, *see* authorities cited at Note, *Implied Rights of Action to Enforce Civil Rights: The Case for a Sympathetic View*, 87 YALE L.J. 1378, 1380 n.15 (1978). But the satement in *Cort* that private actions should be "consistent" with the statute appears, if anything, to be less exacting than the Court's earlier rule that implied remedies be "necessary to make effective the congressional purpose." J.I. Case Co. v. Borak, 377 U.S. 426, 433 (1964).

That Congress passed section 901 in order to provide individuals with equal access to federally aided education could not be clearer. That section 902 procedures are inadequate to guarantee that equality of opportunity is also obvious.[21] Denial of a private remedy under those circumstances would violate a fundamental principle of our jurisprudence and render the guarantee of section 901 "an empty promise." *Allen,* 393 U.S. at 557.

B. Section 902 Was Not Intended To Protect Personal Rights Under Section 901. It Should Not Be Construed to Preclude Private Enforcement of Those Rights.

The Seventh Circuit did not distinguish the reasoning of *Allen* or dispute that section 901 standing alone would create enforceable rights. Instead it concluded that the administrative procedures available to federal agencies under section 902 somehow negated the individual's right to seek redress in the courts. But there is no evidence, in the statute's language or its legislative history, to support this construction of section 902. The provision deals only with enforcement by agencies of their own administrative requirements. The procedures it establishes involve the relationship between the funding agency and the institutional applicant or recipient. HEW expressly denies the individual victim of sex discrimination any meaningful role in the administrative process.

In *Rosado* v. *Wyman,* 397 U.S 397 (1970), this Court determined that a statutory provision authorizing agencies

[21] HEW has conceded that a judicial remedy is necessary for the enforcement of section 901 rights. HEW's view is not simply an agency opinion on a matter of law, to which this Court would generally accord little weight, *see* Piper v. Chris-Craft Industries, 430 U.S. 1, 41 n.27 (1977), but rather a statement on the factual issue of the agency's ability to process Title IX complaints, an issue on which HEW is uniquely well qualified to speak.

to terminate federal funding did not supplant or detract from private judicial remedies implied by a different statutory provision. In *Rosado* petitioners, the intended beneficiaries of state programs under the Aid to Families with Dependent Children program, were met with the argument that the courts should decline to entertain their claim in deference to such a termination process. Mr. Justice Harlan noted the existence of this administrative process, but was "most reluctant to assume Congress has closed the avenue of effective judicial review to those individuals most directly affected by the administration of its program." 397 U.S. at 420. Because those individuals could neither participate in nor obtain their desired relief through HEW's procedures for cutting off funds, he concluded that "neither the principle of 'exhaustion of administrative remedies' nor the doctrine of 'primary jurisdiction' [had] any application to the situation" presented by their claims. 397 U.S. at 406.

Similarly in this case the Court should not rely on section 902 as the means of enforcing individual rights under section 901. Section 902 serves a more limited purpose than section 901. It establishes one method of promoting nondiscrimination: funding agencies are directed to ensure compliance with their administrative regulations through encouragement, threat, and if necessary cessation or denial of federal aid. It is clear without reference to the practical effectiveness of these procedures that they cannot prevent violations of the absolute ban of section 901. Over time recourse to the ultimate sanction of funding cut-offs may have the prophylactic effect of discouraging future discriminatory practices, but in the interim the injuries suffered by individual victims of sex discrimination are likely to remain unredressed. Under section 902 procedures a woman unlawfully excluded from federally supported programs cannot force a fair reconsideration of her application, the one effective remedy for her injury. Voluntary compliance, if achieved, may come too late to provide meaningful relief and may not address her particular case.

The only solid protection afforded by section 902 runs to recipients of federal funds. Those procedures do not prohibit sex discrimination, only arbitrary action taken to correct it. If they are the sole method of enforcing section 901, that section is not the absolute guarantee that its words state.

II. TITLE VI HAS BEEN CONSTRUED TO IMPLY AN ENFORCEABLE PRIVATE RIGHT OF ACTION. TITLE IX SHOULD RECEIVE THE SAME CONSTRUCTION.

That Congress intended Title IX to be enforced in precisely the same manner as Title VI is beyond dispute. Senator Bayh stated that Title IX's enforcement powers were "parallel to those found in title VI of the 1964 Civil Rights Act."[22] The language of the two statutes is virtually identical, and the legislative history of Title IX demonstrates that the parallel was purposeful. The deliberate duplication of Title VI is a strong indication of legislative intent that Title IX be interpreted in the same way. *Northcross* v. *Memphis Board of Education*, 412 U.S. 427 (1973) (per curiam).[23]

[22] 118 Cong. Rec. 5803 (1972).

[23] *Northcross* involved interpretation of statutory language that had been construed previously in interpreting another civil rights statute. The Court stated:

> The similarity of language in § 718 [of the Attorney's Fees Awards Act] and § 204(b) [of the Civil Rights Act of 1964] is, of course, a strong indication that the two statutes should be interpreted *pari passu*. Moreover, "the two provisions share a common *raison d'etre*. The plaintiffs in school cases are 'private attorneys general' vindicating national policy in the same sense as are plaintiffs in Title II actions. The enactment of both provisions was for the same purpose — 'to encourage individuals injured by racial discrimination to seek judicial relief . . . .' " Johnson v. Combs, 471 F.2d 84, 86 (CA5 1972) [*cert. denied*, 413 U.S. 922 (1973)], quoting Newman v. Piggie Park Enterprise, Inc., *supra*, at 402.

412 U.S. at 428. On this reasoning the Court concluded that the language common to the two statutes should be interpreted consistently.

Section 601 consistently has been interpreted to authorize private actions on behalf of victims of discrimination. *E.g.*, *Lau* v. *Nichols*, 414 U.S. 563, 566 (1974); *Bossier Parish School Board* v. *Lemon*, 370 F.2d 847 (5th Cir.), *cert. denied*, 388 U.S. 911 (1967). In fact, "[t]o date the courts, including this Court, have unanimously concluded or assumed that a private action may be maintained under Title VI." *Regents of the University of California* v. *Bakke*, 98 S.Ct. 2733, 2814 (1978) (Opinion of Mr. Justice Stevens). Over the course of 14 significant years of judicial decisions the right of victims of ethnic discrimination to seek redress in the courts has been firmly established.[24]

Mr. Justice White has suggested in his concurring opinion in *Bakke* that Congress, by implication, denied the

[24] *See also* Hills v. Gautreaux, 425 U.S. 284 (1976); Uzzell v. Friday, 547 F.2d 801, *modified*, 558 F.2d 727 (4th Cir. 1977) (*en banc*), *vacated and remanded*, 98 S.Ct. 3139 (1978); Garret v. City of Hamtramck, 503 F.2d 1236 (6th Cir. 1974); Serna v. Portales Mun. Schools, 499 F.2d 1147 (10th Cir. 1974); Gautreaux v. Romney, 448 F.2d 731 (7th Cir. 1971); Alvarado v. El Paso Independent School Dist., 445 F.2d 1011 (5th Cir. 1971); Pabon v. Levine, 70 F.R.D. 674 (S.D.N.Y. 1976); Laufman v. Oakley Bldg. & Loan Co., 408 F. Supp. 489 (S.D. Ohio 1976); Otero v. Mesa County Valley School Dist., 408 F. Supp. 162 (D. Colo. 1975), *vacated and remanded*, 568 F.2d 1312 (10th Cir. 1977); Player v. State Dep't. of Pensions, 400 F. Supp. 249 (M.D. Ala. 1975), *aff'd*, 536 F.2d 1385 (5th Cir. 1976); Natonabah v. Board of Educ., 355 F. Supp. 716 (D. N.M. 1973); Anderson v. San Francisco Unified School Dist., 357 F. Supp. 248 (N.D. Cal. 1972); Southern Christian Leadership Conference Inc. v. Connolly, 331 F. Supp. 940 (E.D. Mich. 1971); Hicks v. Weaver, 302 F. Supp. 619 (E.D. La. 1969).

The Seventh Circuit's attempt to distinguish this line of authorities by suggesting that each of the cases "arose under 42 U.S.C. § 1983" rests on an inaccurate interpretation of the decisions. 559 F.2d at 1082 n.6. For example, in Lau v. Nichols, 414 U.S. 563, this Court relied "solely on § 601 of the Civil Rights Act of 1964" in granting plaintiffs' relief. 414 U.S. at 566. Similarly, Hills v. Gautreaux, 425 U.S. 284 (1976), was grounded on the Fifth Amendment and section 601; since it was brought against federal officials for violation of federal law, it could not have been brought under § 1983. *See also* Bossier Parish School Board v. Lemon, 370 F.2d 847; Laufman v. Oakley Bldg. & Loan Co., 408 F. Supp. 489.

private right to sue under Title VI of the Civil Rights Act because it expressly provided for a private right to sue under Titles II and VII of the same Act.[25] But Title II, prohibiting discrimination in places of public accommodation, and Title VII, proscribing employment discrimination, establish procedural qualifications on the exercise of private rights of action.[26] Moreover, each title specifically delimits the remedies available under it.[27] In these circumstances it is reasonable to conclude that

[25]98 S.Ct. 2733, 2795 (1978). The suggestion of Mr. Justice White is based on the ancient maxim *expressio unius est exclusio alterius.* In 1943 the Court suggested that this principle had "long . . . been subordinated to" less mechanical interpretive methods sensitive to "the generally expressed legislative policy." S.E.C. v. C.M. Joiner Leasing Corp., 320 U.S. 344, 350-51 (1943) (footnote omitted). In addition, the usefulness of the principle is undermined by decisions of this Court recognizing implied judicial remedies under certain provisions of a statute in the face of express judicial remedies under other provisions. Wyandotte Transp. Co. v. United States, 389 U.S. 191 (1967); United States v. Republic Steel Corp., 362 U.S. 482 (1960). *See also* Jones v. Alfred H. Mayer Co., 392 U.S. 409 (1968).

[26]Title II requires notification of appropriate officials whenever state or local law applies and authorizes deference to pending state or local enforcement proceedings. 42 U.S.C. § 2000a-3(c) (1970). Where no other law applies, federal courts may refer complaints to the Community Relations Service established by Title X for initial attempts at voluntary compliance. 42 U.S.C. § 2000a-3(d) (1970). Title VII requires prior resort to state or local remedies and permits federal court actions only when a complaint has been filed with the Equal Employment Opportunity Commission and the Commission has been unable to secure voluntary compliance. 42 U.S.C. § 2000e-5 (1970).

[27]Title II authorizes a person aggrieved to file "a civil action for preventive relief, including an application for a permanent or temporary injunction, restraining order, or other order." 42 U.S.C. § 2000a-3(a) (1970). Under Title VII a "court may enjoin the respondent from engaging in [an] unlawful employment practice, and order such affirmative action as may be appropriate, which may include reinstatement or hiring of employees, with or without backpay." 42 U.S.C. § 2000e-5(g) (1970). This latter provision was amended in 1972 to allow courts in addition to order "any other equitable relief as the court deems appropriate." P.L. 92-261.

Congress dealt specifically with private rights of action in Titles II and VII in order to delimit rights otherwise available by implication under the rule of *Rigsby,* rather than as part of a plan to exclude private actions except where explicitly authorized. Indeed, Congress might well have decided to make judicial remedies under Title VI more fully available. Titles II and VII use the full sweep of the commerce power to reach myriad individuals and enterprises which have not voluntarily submitted themselves to federal jurisdiction. By contrast, Title VI rests upon the straightforward principle that institutions which voluntarily accept federal funds should not administer them in violation of federal law and policy against ethnic discrimination. Senator Ribicoff, one of the chief sponsors of the 1964 Act, noted that while "opponents of the bill ha[d] frankly expressed their [contrary] view" on other provisions,

> The principle of nondiscrimination in the use of Federal funds is so undeniably sound that to my knowledge there has not been one word said in opposition to this principle during the debate on this bill.

110 Cong. Rec. 7064 (1964).

There is no valid basis for according section 901 an interpretation different from Title VI. Congress certainly was aware that a private right of action had been inferred from section 601 when eight years later it repeated the language of that provision in section 901: the draftsmen and sponsors of section 901, legislators well informed of developments in civil rights law, did not act in ignorance of decisions such as that in *Bossier.* They knew how to preclude private actions and could easily have done so had that been their intention.[28] Congress has subsequently demonstrated its

[28]Section 303 of the Age Discrimination Act of 1975, 42 U.S.C. § 6102 (Supp. V, 1975), prohibits age discrimination in federally funded

awareness of the many decisions authorizing private actions under section 601 and similarly worded statutes, and has adverted to them with approval.[29]

CONCLUSION

The fundamental civil rights of the individual granted by Constitution or statute are less than vital if they are no more than a statement of policy guiding the elusive discretion of a massive bureaucracy in the administration of "sophisticated schemes." Judicial remedies are more important than abstract principles.

That courts will fashion appropriate judicial remedies to protect statutory rights is central to our jurisprudence. And nowhere is the courts' role more important than in the protection of basic individual rights. The right of all citizens to equal access to federally aided programs has been clearly established. This Court and other courts repeatedly have entertained private lawsuits in order to

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programs in language deliberately modeled on that in Title VI and Title IX. However, the Age Discrimination Act specifically provides that procedures identical to those in section 602 and section 902 "shall be the exclusive remedy for the enforcement of the provisions of this chapter." 42 U.S.C. § 6104(e) (Supp. V, 1975).

[29] In enacting the Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. § 1988, Congress clearly expressed its understanding that Titles VI and IX could be privately enforced. *See, e.g.*, 122 Cong. Rec. S16,252, S16,262, S16,268, (daily ed. Sept. 21, 1976) (remarks of Sens. Kennedy and Allen, sponsors); 122 Cong. Rec. S16,431 (daily ed. Sept. 22, 1976) (remarks of Sen Hathaway); 122 Cong. Rec. H12,155, H12,159, H12,164-65 (daily ed. Oct. 1, 1976) (remarks of Reps. Seiberling, Drinan, Holtzman, and Bauman). Congress expressed the same understanding concerning Title VI in the debates on the Emergency School Aid Act of 1972, 20 U.S.C. §§ 1601, 1617. *See* 117 Cong. Rec. S11,528, S11,726 (daily ed. April 22, 1971) (remarks of Sen. Cook, sponsor).

The legislative history of the Rehabilitation Act of 1973, 29 U.S.C. § 701 *et seq.*, also indicates congressional understanding that Title VI and IX "permit[ted] a judicial remedy through a private action." S. Rep. No. 1297, 93d Cong., 2d Sess., reprinted in [1974] U.S. Code Cong. & Adm. News 6373, 6391.

remedy ethnic discrimination prohibited by Title VI of the Civil Rights Act. The Seventh Circuit's position on Title IX of the Education Amendments would undermine that established line of authority; more important, it would signal a retreat from the fundamental rule that courts should protect every right with a meaningful remedy. In the sensitive area of discrimination, where bitter experience demonstrates that politics, prejudice, and sheer inertia are cont[illegible]ng intruders, the independent judgment of the courts must be available to the victim of unequal treatment.

The judgment of the United States Court of Appeals for the Seventh Circuit should be reversed.

Respectfully submitted,

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